# Before the Federal Communications Commission Washington, D.C. 20554

In The Matter Of	)	FCC 13-122
Acceleration of Broadband Deployment by	)	WT Docket No. 13-238
Improving Wireless Facilities Siting Policies	)	
	)	
Acceleration of Broadband Deployment:	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of	)	
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	
	)	
Amendment of Parts 1 and 17 of the	)	RM-11688 (terminated)
Commission's Rules Regarding Public	)	
Notice Procedures for Processing Antenna	)	
Structure Registration Applications for	)	
Certain Temporary Towers	)	
	)	
2012 Biennial Review of	)	WT Docket No. 13-32
Telecommunications Regulations	)	

## COMMENTS OF THE CITY OF TEMPE, ARIZONA

The City of Tempe, Arizona ("City"), a municipal corporation and political subdivision of the State of Arizona thanks the Federal Communications Commission ("Commission") for the opportunity to respond to this Notice of Proposed Rulemaking and files these comments in answer to the Commission's questions. The City seeks to provide the Commission with basic information regarding its local right-of-way and facility management practices and to identify the City's concerns with the proposed expansive definitions by offering suggestions for narrower definitions that will protect the interests of the local government's permitting authority and the community that it serves.

# I. Introduction and Executive Summary

While the City recognizes the need for and strongly supports and encourages wireless broadband access for its community, such access must be sufficiently guided through common sense regulation to ensure that other important public interests such as public safety, homeland security for critical infrastructure, building safety and structural integrity, disability access and the residents' aesthetic concerns are protected as well. The City is concerned with the proposed rules that currently advocate for overly broad definitions as a guide to interpreting Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Section 6409(a)") by including in various definitions the words "but not limited to" and by potentially defining "transmission equipment" as being the same as "associated equipment". The Commission has confirmed that it does not wish to act as a national zoning board; however, some of the proposed content of the rules set forth would have exactly that effect. The City has developed considerable expertise applying its policies to protect and further public safety, economic development, and other community interests and is actively working on adapting current ordinances to be relevant to the ever changing technology needs of its citizens. While the industry always tends to move faster than government, the City is very willing to work with wireless broadband providers to develop relevant regulations that balance competing interests and impose processes that are efficient and not unduly burdensome.

By adopting overly broad definitions that harm rather than protect the interests of the community, the Commission could disrupt the wireless facility siting process at substantial cost to local taxpayers and to the local economy. We believe that a basic respect for local control, a fair reading of the Constitution and the Communications Act, and an honest assessment of the Commission's limited expertise on local land use matters all point to the same conclusion: this is no place for federal rule-making that seeks to take away local control where such control is essential to public safety and aesthetic concerns over the visual impact such wireless facilities usually impose.

Since Section 6409(a) is a mandated takeover of a local government's land use control rights, it should be narrowly construed to the appropriate situations when a proposed collocation, modification, or removal has only a minimal adverse impact on the community. Even adverse impacts can be tolerated if the appropriate parameters are set (e.g. diesel and other fuel-powered generators as backup power supplies have an adverse impact, but there is an offsetting desired impact as well, so while they should not be banned from sites, their placement and use do need to be regulated for noise and other environmental concerns). As more fully explained on pages 5 through 7 under II.A.13(40), including" backup power supply" in the definitions would be detrimental to public health and safety if these fuel-powered generators were to be allowed as of right with no oversight by the City.

To that end, the City respectfully proposes the following more narrowly-tailored definitions that could be used in § 1.40001 that will protect the interests of the local government and the community it serves while still giving effectiveness to the intention of Section 6409(a) and explains the reasons for such alternate definitions within the document.

**Base Station.** A station at a specified site that enables wireless communication between user equipment and a communications network including any associated equipment defined as radio transceivers, antennas, electronics, coaxial or fiber-optic cable and the primary power supply. It may encompass such equipment in any technological configuration, including distributed antenna systems and small cells.

**Collocation.** The mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

**Transmission Equipment.** Any equipment that facilitates transmission for wireless communications such as radio transceivers, transmitting devices, switches, antennas, coaxial or fiber-optic cable and primary power supply cables. It does not, however, include external battery or diesel or other fuel-powered generator backup power supplies or support structures.

**Wireless Tower.** A structure built for the sole or primary purpose of support Commission-licensed or authorized antennas and transmission equipment used for a wireless communications service.

The City has successfully managed its property, public utility easements ("PUE") and the public right-of-way ("ROW") to encourage deployment of several broadband networks to date. As a result, broadband service is available to 100% of the households and businesses in our jurisdiction. There is no evidence that our policies or fees with respect to placement of facilities in the ROW, PUEs or on City

property have discouraged broadband deployment. Our community *welcomes* broadband deployment, and our policies allow us to work with any company willing to provide service. To date, no company has cited our policies as a reason that it will not provide service. We believe our policies have helped to *avoid* problems and delays in broadband deployment by ensuring that broadband deployment goes smoothly for both the providers who follow the rules and the larger community. The City has actively assisted both Cox Communications and Century Link (formerly Qwest) in their accelerated deployment of broadband service to our community through their fiber-to-the-node and fiber-to-the-cell, (FTTN/FTTC) program and their other deployment initiatives. Within the City, there are also several other providers that have fiber optic facilities in the ROW.

On the other hand, we also know that many entities seeking access to our ROW and facilities would prefer to live without rules or regulations, to the great detriment of other users, abutting landowners, commuters, and the general taxpayer. Specifically, one Distributed Antenna Systems (DAS) provider claimed to be exempt from fees for use of the right-of-way for its fiber optic cables and "offered" to pay only a *de minimus* fee for attachments of its antennas to City-owned poles.

Finally, and very importantly from the City's perspective, the City agrees with and supports the Intergovernmental Advisory Committee's ("IAC") Advisory Recommendation Number 2013-9 statement that the Commission should "clarify that restrictions on state, local and tribal authority arising from Section 6409 apply in a land use regulation context and do not apply to state, local and tribal governments acting in a proprietary or contractual role." The City needs to have the ability to control the use of its property for wireless facilities.

# II. Expediting Environmental Compliance For Distributed Antenna Systems And Small Cells

II.A.10 (37)<sup>2</sup>. (Updating the NEPA Exclusion for Collocations in Note 1 to § 1.1306)

<sup>&</sup>lt;sup>1</sup> IAC Recommendation on Issue # 2 at p. 3.

<sup>&</sup>lt;sup>2</sup> The City will be offering comments in response to the particular paragraphs by identifying the number of the paragraph in the summary version as published in the Federal Register on December 5, 2013 and putting in

The City is very concerned that the Commission's proposed use of the words "on other structures," "structures," "water tanks," and "road signs" when defining the exclusion as they would relate to collocations. Specifically, "on other locations" could imply public safety/city communication towers which could impact local and national concern. The addition of "structures" does not consider the adverse impact caused by the additional ground mounted equipment which accompanies DAS and small cells. "Water tanks" are considered part of the City's critical infrastructure by the U.S. Department of Homeland Security. Allowing attachment or collocation adds risk to the protection of that critical infrastructure as discussed more fully under Section IV.1.66 (108) on page 14 below. Finally, "road signs" is too generic a term. The size, configuration and type of the signs vary greatly and particular locations may or may not make them suitable for a wireless facility attachment. Adding a wireless facility to a sign could pose a sight distraction for drivers, thus increasing accidents.

#### II.A.11 (38). (Use of "Other Structure")

Adding the words "other structure" makes the definition simply too broad, since that could mean literally anything. Even defining other structure to include utility poles, water tanks, light poles and road signs as suggested assumes that these other structures" are equivalent to a building or antenna tower which is simply not the case. There are homeland security and critical infrastructure concerns that a local government has with respect to anything placed on its water tank or facilities and especially when a private company wants 24/7 access to a structure containing a water supply. "Road signs" is similarly not a homogenous category. "Light poles" may include traffic signals, which are not necessarily conducive for antenna or small cell or DAS placement for a variety of reasons.

## II.A.13 (40). (Definition of "Associated Equipment" as including Backup Power Supplies)

"Associated equipment" should not include diesel generators if that term is to be used in Note 1 to § 1.1306. Instead, the term "transmission equipment" should be used. The definition of "associated

parenthesis the cross-reference paragraph number of the full version of the NPRM FCC 13-122, adopted and released on September 26, 2013.

equipment" is crucial as to whether there should be a categorical exclusion. If that definition includes back up power supplies which could include diesel and other fuel-powered generators, then there should not be a categorical exclusion for a diesel or other fuel-powered generator to be put on an existing building antenna tower or "other structure." The City objects to there being a categorical exclusion that would allow a diesel generator INSIDE an existing building or "other structure." A diesel or other fuel-powered generator causes fumes, noise, and the potential for exposure to hazardous substances if there is a leak or a spill.

Diesel and other fuel-powered generators and battery backups should not be allowed to be installed without the appropriate oversight. For example, the City has adopted the International Building Code and International Fire Codes which have prescribed limits for the amount of generator fuel or battery electrolyte fluid that may be stored inside a building in any one location. Usually when installed within a building, the room that contain a generator or battery back-up power supply is separated from the remainder of the building by walls constructed of fire-resistive materials which could have a fire rating of between 1 to 3 hours. Depending on the type of back-up power used, the rooms must have either mechanical ventilation or openings to the exterior for exhaust and fresh air. Limiting the EA to just RF emissions is not even relevant to a diesel generator, which does not produce RF emissions in the first place.

"Back up power supply" should not be included in either the definition of "associated equipment" or "transmission equipment". If the "associated equipment" for DAS includes diesel generators and other ground equipment, such associated equipment should not be covered under any type of categorical exclusion. A local government's inability to regulate the placement of ground mounted equipment, inclusive of backup generators, could have a very significant visual impact as well as create safety hazards for the traveling public whether it is pedestrian, bicycle, vehicular or other modes of travel and for our disabled citizenry. A diesel or fuel-powered generator always raises environmental concerns (fumes, noise, potential spills, etc.). Again, the International Building Code and International Fire Code

regulate the placement of these systems on the ground next to a building based on the quantity for fluids. If located on the roof, these Codes would have prescriptive measures to justify the added weight of the equipment and spill containment of the fluids.

The categorical exclusion should not be expanded to cover associated equipment, but should be limited to the mounting of antennas. At a minimum, "power supplies" should be defined to specifically exclude diesel generators.

#### II.A.15 (42). (Collocation exclusion for smaller facilities)

The Commission granting a categorical exclusion for a collocation of a macrocell on a water tank or facility could have a very significant negative impact as it applies to visual, historical and security implications and should not be part of any categorical exclusion category. As more fully described below in Section IV.1.66 (108) on page 14, water facilities need protection against the mandatory placement of a wireless facility by a private party even if there are wireless facilities placed on the water facility by the local government for its own public safety and/or water communication needs.

## II.A.19 (46). (NEPA exclusion for DAS)

The City agrees with the findings in the proposed rule regarding the definition of exclusion by reference to a specific wireless technology such as DAS would be over-inclusive. Associated facilities could be larger and more obtrusive than contemplated thus having a greater potential for significant environmental impact.

#### II.A.20 (47). (Objective criteria for Categorical Exclusions)

The Commission should include reference to the height of the supporting structure, the size of the antenna and the dimensions of the equipment cabinets and any other ancillary equipment to any definition relating to categorical exclusions.

#### II.A.22(1)(2) (49)(1)(2)). (Definition of DAS and Small Cell Facilities)

To qualify for a categorical exemption, the industry has proposed a definition of DAS and Small Cell facilities as equipment with a 17 cubic feet in volume, but does not want the volume of the <u>support</u> <u>equipment</u> (electric meter, concealment, telecom demarcation box, ground-based enclosures, battery backup power systems, grounding equipment, power transfer switch, and cut-off switch) to be included in the calculation. The problem with this definition is that there is no physical dimension or weight limit given, which is important from a public safety, structural integrity impact, and aesthetic standpoint. The impact of the footprint of the support equipment on a PUE or the ROW needs to be considered. The weight of a DAS node or Small Cell is also very significant if it is to be placed on a pole and the weight of the support equipment if it is to be installed on a roof top also needs to be considered.

The proposed definition for antennas allows an exemption if they are 3 cubic feet in volume or less, but again there is no limit on the number of antennas. Thus the DAS and Small Cell sites could be continually expanded without oversight.

Accordingly, in addition to the antenna volume enclosure of no more than three (3) cubic feet in volume, the City recommends the addition of a limitation to the number of antennas allowed per site and that there be physical dimension limits and weight limits included in the definition of what facilities will be exempt. Since the acceptability of such physical dimension limits and weight limits could vary depending upon placement and the structural integrity requirements of the actual structure upon which they are placed, it would be prudent to have the smallest and lightest requirements qualify for an exemption.

#### II.A.22(3) (49(3)). (Definition of Infrastructure Volume)

Excluding the calculation of the infrastructure volume from the equipment volume is unwise given that there is no limitation whatsoever on the volume, size, or weight of the infrastructure.

## II.A.23 (50). (Location determining applicability of exclusion)

The City believes that the proposed rule should limit the number of non-substantial increases in size over existing structures to only one (1). After the first non-substantial increase, any increase would be subject to Section 106 review. Multiple incremental increases could create a negative impact.

The City agrees that any categorical exclusion should only apply in ROW designated for utilities or telecommunications. At no point should categorical exclusions be considered for city owned property due to access limitations for security purposes along with other numerous detrimental impacts.

# II.A.24 (51). (Underground Corridors as location-based exclusions)

Underground corridors should not be included as part of the location-based exclusions, particularly for new installations. New ground equipment, inclusive of generators, or new poles placed closer than 6-feet of existing underground water, sewer and storm drain lines may result in the City being denied access to the buried utility and if the City had to repair the line, the new equipment and/or new pole would also be affected for operation.

#### II.A.25 (52). (Exclusion for DAS/Small Cells)

Should a request for installation of a new DAS or small cell site fall outside of the existing aerial or underground corridor, there should not be allowed a categorical exclusion. If it is to be placed outside of a corridor, then there are no existing poles so the addition of antennas would have a significant impact to the site.

The claim that these sites have little or no appreciable adverse impact to historic sites seems completely untrue. The rules should include the NEPA process be followed by insuring the inclusion of culturally significant and/or historical sites.

# III. Environmental Notification Exemption For Registration of Temporary Towers

The City's position is that temporary towers should not be included as part of any environmental exemption. Most often temporary towers include generators as a power source, which causes significant noise, fumes, and vibration impacts to its surroundings.

## III.47 (84). (Time Limit for "Temporary")

The City does not believe that a temporary tower should be allowed to remain in place for up to 24 months. With respect to the exemption, the 60 day limit may be reasonable if the site does not utilize a generator power supply and that it meets other requirements such as ADA/pedestrian access.

# IV. Implementation of Section 6409(A)

#### 1. Terms in Section 6409(a)

#### IV.1.55 (97).

The City welcomes having good workable definitions for the terms in Section 6409(a), however having broad definitions that will have the effect of taking away local government control in the areas of public safety, ROW management and community aesthetic concerns will do more harm than good.

## IV.1.56 (98). (Alternative to Rule-Making)

Ideally, the City believes that best practices and/or a model ordinance that is developed through a consensus of industry and municipal interests would be the best process for a successful implementation of the goals of Section 6409(a). The proposed definitions are too one-sided from the industry perspective and do not reflect an input from local government tasked with minimizing any undesirable effects that may occur from completely unrestricted collocations where public safety and other concerns are raised. Best practices and a stream-lined process for collocations are also desirable from a local government perspective because a local government wants to ensure that its residents and visitors have adequate

wireless broadband services. To assume otherwise is to cast a local government as being an opponent to technology which is simply not the case. High-quality, cost-competitive broadband access City-wide is greatly important to the City's economic development and quality of life for its residents.

## IV.1.58 (100). (Transition Period)

The City agrees that there should be a transition period that would allow local governments to implement the requirements into the appropriate ordinances and procedures. A minimum of six (6) months is needed because our City Council only meets twice a month and ordinances require two (2) hearings, so the approval process alone could take up to six (6) weeks depending upon the timing of the City Council meetings.

#### IV.1.59 (101).

The term "substantially change" needs to be defined. If the equipment becomes smaller or less obtrusive then there is no substantial change; however, if the equipment is larger while one change may not be significant, several subsequent changes could.

## IV.1.63 (105). (New expanded definition of "Transmission Equipment")

The definition of transmission equipment should <u>not</u> include a backup power generator, especially a generator that is powered by diesel or other hazardous substances. While a backup power supply is an important and desirable feature of a wireless facility, it is not "necessary" to its operation as a main power supply cable is. Many operational wireless facilities currently operate today without them. A backup diesel generator does not "transmit" communications. It does however generate fumes and noise which need to be regulated by the local government in accordance with applicable laws and safety regulations. Section 6409(a)'s collocation as of right should <u>not</u> apply to backup power supplies. Local governments do recognize the important of backup power equipment because there is a public interest in continued service during emergencies and the City's comments <u>should absolutely not be interpreted as</u>

being opposed to the installation of this equipment. However, it is very important to the local neighborhoods and to the management of the right of way and public property that the City have the ability to regulate the use of such backup power supplies. Backup generators that operate on fuel sources like liquid propane, diesel, kerosene or other flammable liquids present significant public safety and environmental concerns. These should not be allowed to be installed without the appropriate oversight. For example, the City has adopted the International Building Code and International Fire Codes which have prescribed limits for the amount of generator fuel or battery electrolyte fluid that may be stored within a building in any one location. Usually when installed within a building, the room that contain a generator or battery back-up power supply is separated from the remainder of the building by walls constructed of fire-resistive materials which could have a fire rating of between 1 to 3 hours. Depending on the type of back-up power used, the rooms must have either mechanical ventilation or openings to the exterior for exhaust and fresh air.

Backup power generators added to a site could have significant negative impacts to the surrounding area. Diesel generators produce fumes, noise and have the potential for a spill. Placement of a generator should be regulated for location since there is a potential negative impact to surrounding residences or businesses from a generator. As cited earlier, an example of this concern is when the City's Fire Department had to respond to a request for emergency service due to fumes from the exhaust of a diesel generator entering a building through the building's fresh air intake vent.

The definition of "Transmission Equipment" should <u>not</u> include "all the components of a base station" especially if the components of a base station include "associated equipment," which includes backup power supplies such as batteries and diesel and other fuel-powered generators. Also the words "such as, but not limited to" should be deleted from this definition as well as "backup power supply." Including the words "such as, but not limited to" makes this definition far too broad. This is particularly important because an Eligible Facilities Request that the Commission is proposing to force a local government to allow involves the collocation, removal and replacement of "transmission equipment," so

if the definition is so broad that virtually anything is included, then the local government has no control over whether the applicant wants to put an unlimited number of batteries, diesel generators, and any other equipment that contains potentially harmful substances to operate.

## IV.1. 64 (106). (Definition of "Antenna" and "Transmission Equipment"))

The Commission asked whether the NPA definition of antenna should be the definition for transmission equipment. The answer is "No." Since the NPA definition of antenna includes power sources, shelters and cabinets, these are not "transmission equipment." "Transmission Equipment" should be defined narrowly rather than include ancillary objects that greatly expand the restrictions placed on local government by the mandatory scope of Section 6409(a).

Instead, the City proposes the following definition of "Transmission Equipment" as requested by the Commission in Fed. Reg. Paragraph 60 (102):

Transmission Equipment. Any equipment that facilitates transmission for wireless communications such as radio transceivers, transmitting devices, switches, antennas, coaxial or fiber-optic cable and primary power supply cables. It does not, however, include external batteries or diesel or other fuel-powered generator backup power supplies or support structures.

#### IV.1.65 (107) (New Expanded Definition of "Base Station")

As further explained below, the City of Tempe is concerned with the Commission's proposed expansion of the definition of "Base Station". In particular, the bolded language as highlighted in yellow below is of particular concern.

"Base Station" means a station at a specified site that enables wireless communication between user equipment and a communications network including any "associated equipment" such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply". It includes a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station. It

may encompass such equipment in any technological configuration, including distributed antenna systems and small cells.

IV.1.66 (108). (Types of Structures that can be considered a wireless tower or base station)

As explained above, the definition of base station should not include the structure that supports the base station. The proposed definition is too broad and should be limited as suggested by the language given above. Broadening the definition of base station to include every conceivable structure is expanding the reach of Section 6409(a) beyond where it should reasonably be given a local government's interest in balancing the needs of the community for technology and the community's needs. Furthermore, collocation as of right <u>inside</u> a building without regard to the effects of a diesel generator would be against the interests of any building inhabitants.

While the City encourages collocation of wireless facilities when and where appropriate, there can be structures that support wireless facilities where collocation is not appropriate. For example, the City currently has wireless facilities on Hayden Butte (also known as "A" Mountain or Tempe Butte), which is a Tempe Historic Property and because of the Native American cultural significance of that land feature, there has been an effort to relocate such facilities if and when an appropriate other location is found (like a tall building in the area). Including Hayden Butte as a "base station" where the City would be required to allow collocation of additional antennas and/or transmission equipment when it is trying to eliminate such equipment would be counterproductive. Clearly Hayden Butte was not built for wireless facility use and the City should not be required to allow collocation as of right just because there is no "substantial increase in size."

Allowing a water tank or water facility to be classified as a "wireless tower" or "base station" if it has a City's own wireless facility on it and then subjecting that structure to a mandatory collocation by a private company for its wireless facilities would create a conflict with Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (P.L. 107-188, 42 U.S.C. § 300i) that required community water systems serving more than 3,300 individuals to conduct vulnerability

assessments and prepare emergency response plans incorporating the results of such assessments to the EPA. A mandatory collocation would present structural, safety and other risks and would be contrary to the City's efforts to control and secure its water facilities. Accordingly, Section 6409(a) should not be interpreted to apply to the public property of the City and should not affect the ability of the City to control the use of its property for wireless facilities.

#### The City's Proposed Tower Definition:

Tower. A structure built for the sole or primary purpose of support Commission-licensed or authorized antennas and transmission equipment used for a wireless communications service.

Note: This assumes that "transmission equipment" does <u>not</u> include backup power supplies, shelters, or cabinets.

The Commission should <u>not</u> interpret the reach of Section 6409(a) to include a building or a cabinet with equipment inside to be included in the terms 'base station' or 'tower'. Other structures even if they are capable of housing a wireless facility have different needs.

The addition of the term "other structure" to mean anything is potentially harmful to a local government's interests especially in the context of a mandatory "right" to locate communication facilities there without regard to public safety, homeland security, building safety, and aesthetic concerns relating to the location. Different structures raise different concerns and require different levels of scrutiny. For traffic signal structures, there are electronic interference issues, driver distraction, traffic operation issues, etc.

IV.1.67 (109). (Objection to the words "It includes a structure" as being part of the definition of Base Station)

The City also objects to the definition of "Base Station" as "including a structure" because a piece of the base station is not itself a base station as the Intergovernmental Advisory Committee to the FCC

(IAC) noted in its Recommendation Number 2013-9. In the case of the City, under this definition, one of the City's "mountains" (Hayden Butte) which supports an antenna would then be considered a "base station". Including "structure" as part of the base station also would allow the interpretation of a base station being a concrete pad upon which a diesel generator sits even if the concrete pad had no transmission equipment, antennas, or any communications equipment on it if "diesel generator is 'associated equipment' that constitutes 'part of a base station' which is the 'structure' (the concrete pad). Such an interpretation would cause many problems and is surely not what the Commission intends. The City agrees with the IAC that the definition of base station should be limited to the set of equipment components that collectively provide a system for transmission and reception of personal wireless services.

Accordingly, the City proposes the following definition of Base Station.

Base Station. A station at a specified site that enables wireless communication between user equipment and a communications network including any associated equipment defined as radio transceivers, antennas, electronics, coaxial or fiber-optic cable and the primary power supply. It may encompass such equipment in any technological configuration, including distributed antenna systems and small cells.

IV.1.68 (110). (What Equipment Constitutes a Base Station)

Transmission equipment should be defined less expansively than the equipment that constitutes the base station. Structures housing particular equipment should not be included in the definition of transmission equipment. In the case of DAS or other wireless technologies that include various components dispersed over a large area and/or owned or controlled by different parties, the local government's regulatory authority should not be constrained through a broad definition that could potentially harm the community if equipment is allowed to be installed without regard to local public health and safety laws and/or the aesthetic requirements of a local community.

Objection to the words "But not limited to" being within the definition of Base Station

The inclusion of the words "but not limited to" in the definition of Base Station as highlighted below is overreaching, unnecessary and introduces ambiguity and the potential for a local government and an applicant to be in dispute over whether certain equipment must be allowed as of right.

## Objection to the words "And backup power supply" being within the definition of Base Station

The inclusion of "backup power supply" in the definition of "associated equipment" is a potential problem, especially since a "backup power supply" can be either a battery or a diesel or other fuel-powered generator. The inclusion of batteries and diesel and fuel-powered generators at a wireless facility site need to be subject to the approval of a local jurisdiction. While the City recognizes the need for and desirability of backup power supplies, both battery and diesel or other fuel-powered, the installation of such needs to be within the rules set forth by the local government. Diesel generators in particular contain hazardous substances that could leak or spill, emit fumes and noise. A local jurisdiction should be allowed to protect its citizens and the environment on public property and in the ROW when it comes to backup power supplies. Diesel generators need to be subject to the appropriate level of review, rules for when they are run for testing, and subject to all applicable safety and environmental standards. While posing less of a potential harmful impact on the environment, battery backups also need to be subject to the appropriate safety and environmental rules. Backup power supplies should be dealt with separately and not included in the definition of "associated equipment" that is found in both the § 1.40001 definition of "Base Station" or in the language of Note 1 to § 1.1306 (as discussed on pages 5 through 7 under Section II.A.13 (40)).

# "Associated equipment" needs to be regulated.

If the Commission takes away the City's ability to regulate the placement of ground mounted equipment, inclusive of backup generators, there would be a very significant visual impact as well as creating safety hazards for the traveling public whether it is pedestrian, bicycle, vehicular or other modes

of travel and for our disabled citizenry. Examples of the City's concerns for safety if the equipment, inclusive of backup generators, is allowed to be placed without regulation include:

- New ground equipment blocking the sight distance for a vehicle entering a busy street.
   Our experience with this is that traffic accidents increase if the equipment blocks driver sight distance at a drive entrance to a street.
- New ground equipment preventing our water department from safely accessing a buried water or sewer line to repair a break due to the equipment being placed above the line. Even with the equipment being placed close to a buried utility could prevent the access to the buried line if there is not adequate room for installation of a trench box (which holds back the wall of the trench). Our typical requirement is for equipment to be a minimum of 6-feet clear of the buried wet utility.
- New equipment should not be placed where it prevents our fire department from
  accessing a fire hydrant and being able to lay a hose around the hydrant. We typically
  require a 3 foot clear zone to a hydrant.
- New equipment should not be placed where it has the potential of causing a bicycle to catch the handlebars on the edge of the equipment. We typically require a minimum of 2-feet clearance from equipment and poles to the edge of a sidewalk. We never allow equipment or poles to be in the sidewalk for this very safety concern.
- The City has established minimum widths of sidewalks for our residential, collector and arterial streets. The volume of pedestrian and bicycle traffic on these sidewalks does utilize the full width of the walk as established. The categorical exclusion would allow equipment to be placed in the sidewalk and could result in no longer having an ADA compliant pathway and could have the safety hazard of pedestrians/ bicycles forced to

step into the busy street as they have to avoid an obstruction (the new equipment that was placed within the travelway).

• The City generally does not allow new ground mounted equipment to be located within an alley due to the limit of clear space that would result after placement of the equipment. If the placement is not regulated, the ability of fire truck, sanitation trucks or Public Works maintenance vehicles may be prevented from being able to travel the alley. The City has published avoidance zones criteria that regulates placement in alleys of small (less than 12-inches in width or a volume of 1-square foot) for Cox and CenturyLink equipment. This criterion was developed because even the small equipment was being hit by the service vehicles using the alleys when the placement occurred in certain areas of the alley.

#### *IV.1.69 (111). (Definition of "Existing")*

The definition of the word "existing" should not be expanded to mean a structure that is not currently used as a wireless tower or base. To adopt Verizon's proposed definition would mean that any structure of any kind then becomes a "potential wireless tower or base." This would clearly conflict with the City's local authority to review construction proposals that have an impact on the community. Since Section 6409(a) requires mandatory approval and takes away local government's ability to protect the community, the definitions proposed by the Commission should reflect a narrower interpretation than an expanded one that strips a local government of oversight in this area.

#### IV.1.71 (113). (Collocation, removal, and replacement)

Since the definition of collocation means the mounting or installation of "transmission equipment" on an eligible support structure, the definition of "transmission equipment" should be the narrow definition as proposed above, not the proposed expanded definition that would automatically

include a diesel generator because it would be a "backup power supply." Collocation should be considered a significant change since additional equipment would be added to the site.

For Section 6409(a) purposes, the City prefers the definition of "collocation" should be the same as the definition in the Collocation Agreement, namely that collocation means "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."

The City agrees with the City of Tucson that "existing" should mean only those existing towers, buildings or structures that have been approved for such transmission equipment and that while the equipment approved initially does not have to be in place, the approval process does need to be completed and the approval process should provide for future collocations.<sup>3</sup>

## IV.1.72 (114) (Equipment not located on the structure)

If a collocation requires the addition of ground equipment for example, if that equipment will be larger than the previous equipment that could be an issue depending upon the location of the original equipment. If additional equipment is needed for the replacement or new antennas, then whether there is actually the space available on the ground could be an issue as shown by the City's comments in Section IV.1.68 (110) above on pages 17-18.

## IV.1.73 (115).

The reinforcement or hardening of a pole by its definition would require the pole to be larger and/or made of different material thus creating a significant change to the existing pole. If an otherwise covered collocation or replacement of transmission equipment requires the replacement of the underlying structure, then this should <u>not</u> be considered a Covered Request that would <u>require</u> approval by the local government. The new underlying structure may well present issues that require regulation and/or review

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<sup>&</sup>lt;sup>3</sup> City of Tucson Response on page 4.

by the local government. For example, the stealth nature of the underlying structure must be maintained and that requirement should not be thwarted by an over expansive interpretation of Section 6409(a). Any new structures (including replacement ones) should be subject to review and not granted automatic approval.

## <u>IV.1.76 (1) (118(1)). ("Substantial Increase in Size of Tower" definitions)</u>

The City disagrees with the provisions of the four-prong test to determine the "substantial increase in the size of the tower." The City of Tempe requires a use permit for all wireless communication facilities. The analysis for approval of the facilities is based on many factors, of which, the determination on the maximum height of a cellular tower and antennae is based on the visual context of the area and the height relationship to surrounding structures. Allowing a percentage of increase of a seemingly reasonable height allowance, per the substantial increase definition, preempts local authority and may be detrimental to the surrounding area. The impact of the change cannot be determined without greater examination of the aspects of the original tower and antennae application approved with the use permit that was granted by the municipality.

The City supports the IAC's recommendation that any change in physical dimensions that would violate a building or safety code, violate a federal or state regulation such as an environmental law, historic preservation law, FCC RF emissions standard, FAA requirements, etc. or violate the conditions of approval under which the site construction was initially authorized, should be considered a substantial change in the physical dimensions.

#### *IV.1.76* (2) (118(2)). (Number of Equipment Cabinets))

This would always allow the addition of 3 new equipment cabinets with no restrictions on size, weight, appearance, etc. The addition of equipment cabinets without municipal review could negatively impact a surrounding area by diminishing aesthetic character, site visibility, parking, access, natural light and potentially create a nuisance for a surrounding area from noise or vibration. The City reviews

equipment cabinets as part of use permit application for wireless communication. The need for an administrative review would determine if there are structural consequences due to an overall increase in the weight of the equipment cabinets on non-structurally sound surfaces, leading to potentially negative impacts to life and safety; thus the City objects to this rule as a "by right" clause for allowing tower and antenna modifications.

## *IV.1.76 (3) (118(3)). (Adding Appurtenances)*

The City objects to this definition because it would automatically allow the extension of antennas outward that could lead to the destruction of existing site camouflage. Any non-stealth change to a stealth structure should not be considered a Covered Request and required to be allowed by a local government under Section 6409(a).

## IV.1.77 (119). ("Increase v. Change")

The word used in Section 6409(a) is "change" so not just "increases" are relevant. Any change should be considered in reference to the original size and shape of the structure, not the size and shape at the time of the request for modification. While it may be tolerable to allow the first modification to be "of right", subsequent modifications should be subject to a review by the City.

#### IV.1.78 (120). (Physical Dimensions)

The calculations for the change of the physical dimension of a site from collocations should always be based upon the structure's original dimension not the cumulative impact ongoing modifications. Original dimensions should always be considered, whether or not the previous expansions occurred before or after the enactment of Section 6409(a).

## IV.1.79 (121). (Protection Needed for Stealth/Camouflage Sites)

Any changes in physical dimensions that defeat or are inconsistent with stealth characteristics should be considered substantial. The standards for what constitutes a substantial change should be different depending upon the type of structure to be modified. What constitutes a substantial change to a building or utility poles is absolutely different than what a substantial change to a tower would be. Additionally, the definition of tower should not include buildings or any structure that may be certified for human occupation. Changing the physical dimensions of a building should require a review process.

#### IV.1.80 (122). (Height)

Height is one of the most significant changes reflecting the potential of adverse effects. A small increase in height could greatly increase the structures negative impact to the surrounding area. The City agrees with the IAC position that "[the] questions of substantiality ... cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions." Substantial change must be evaluated in the context of a specific installation. In some cases an increase of 10 % may not have an effect, whereas in a different community and/or location, an increase of 2% may be significant. Thus any increase in size that would exceed existing zoning regulations like a height limit are "substantial" and any future additions should be limited to a percentage expansion of the <u>original</u> structure.

## 2. Review and Processing of Applications, Time Limits, and Remedies

# IV.2.82 (124). (May Not Deny and Shall Approve Language)

This paragraph appears to remove the jurisdiction's regulatory authority completely. If the original facilities adverse effect was greater than anticipated or if there is a change of conditions, this paragraph would eliminate any authority to deny an even greater adverse effect.

<sup>&</sup>lt;sup>4</sup> IAC discussion of Issue # 1 on page 2.

The City of Tempe is in full agreement with the proposal that any "may not deny and shall approve" language only applies when the State or local governments are acting as land use regulators and not property owners.

The City also needs the discretion or authority to deny a Covered Request if it would violate a locally-adopted public safety code and/or building code designed to protect life and/or property (including but not limited to ANSI/EIA/TIA-222, Revisions G, as amended (tower safety code); the International Building Code, the International Fire Code, National Electrical Safety Code, National Electric Code, Uniform Fire Code, Uniform Building Code, etc.). Requiring approval cannot be absolute or the safety of individuals would be put at risk if there were structurally unsound buildings or towers.

City needs the ability to grant the collocations and replacement of transmission equipment subject to conditions that take into account public safety codes and local land use laws. Covered requests need to comply with local laws. The City should not have to grant a request for a facilities modification that would increase the height above the maximum height permitted by the applicable zoning ordinance. A covered request needs to comply with local building codes and land use laws. The request also needs to comply with laws relating to health and safety, load-bearing limits, fall zone or setback distance.

The City agrees with the IAC that the "may not deny and shall approve" applies only to a local government acting in its role as a land use regulator and does not apply to the City acting in its capacity as the manager of the ROW and/or in its capacity as a property owner. Section 6409(a) should <u>not</u> apply nor impose any time limits on a landlord's ability to refuse or delay action on a collocation request.

Section 6409(a) should not be used to circumvent contractual provisions in a ROW use agreement or in a lease or license agreement relating to public property. These agreements should govern the exact dimensions and specifications and should control with respect to modifications and/or collocations on the structures in the ROW and on public property.

#### IV.2.83 (125). (Compliance with State or local building codes and land use laws)

Covered requests should comply with any applicable state or local building codes and land use laws. The zoning and land use regulations are formulated through a public process; therefore, these facilities should comply. A variance process is available should the existing requirements appear to be too restrictive.

The City should not be forced to allow a wireless carrier to collocate or modify sites which may involve new wireless facilities placed in the public ROW such as sidewalks, if such ground equipment is part of a DAS or small cell installation. Title II of the Americans with Disabilities Act (ADA) was designed to ensure that new structures would not impede disabled access to sidewalks. There may well be places within the ROW where there is simply no room for ground equipment or the placement of ground equipment would present a public safety risk. The City should have the land use discretion to require the placement of equipment in an underground vault or at some other acceptable location.

## IV.2.84 (126). (Non-conforming Existing Towers or Base Stations)

As with any other businesses, any modifications including collocations must be brought up to the new and current zoning standards.

## IV.2.85 (127). (Modification Approval for a Non-Conforming Tower or Base Station)

The City should not be mandated to allow a subsequent collocation on a structure that is presently a stealth or camouflaged structure if the collocation or modification changes the stealth or camouflage nature of the structure.

#### IV.2.86 (128).

The Commission has asked if modifications that alter a facility inconsistent with local ordinance or original conditions be considered to "substantially change" its physical dimensions. The City's response to this question is an unqualified "Yes". The Commission also asked if a tower that is legal but non-conforming not be considered "existing" for purposes of 6409(a). Again, the City's answer is "Yes".

## IV.2.87 (129). (6409(a)'s Mandate only applicable to Regulators, not Municipal Landlords)

The City of Tempe is in full agreement with the IAC argument that the "may not deny and shall approve" mandate under Section 6409(a) should only apply to local government acting in their role as land use regulators not as property owners of the ROW, PUE's and other public property. The Commission's question as to whether 6409(a) impose no limits on a landlord's ability to refuse or delay action on a collocation request assumes that it is always the City's or "delay" when often the applicant is actually the one who fails to provide information, reach agreement, timely respond, etc. Often, the applicant is resistant to comply with insurance, indemnity, safety, lease payments, etc. when the lease or license with the City needs to be amended. The City must retain the authority and ability to deny a Covered Request if it would violate a public safety code designed to protect life and property.

## IV.2.88 (130). ("Application Procedures")

The requirement to approve facilities should be seen as a process but should not imply an expedited one. State and local governments must have time to review, gain input, and if not practical, propose alternate sites.

Fact-finding is required by a local government to determine whether Section 6409(a) applies and local governments need an application completely filled out and the ability to administratively review it even if Section 6409(a) applies. The local government needs the flexibility to determine the relevant information that it needs to evaluate the request and the FCC should not place limits on documentation that may be required with an application. There should not be federal limits on applicable fees, processes or time for review. The FCC should not prevent any process that involves participation by the public

and/or any public noticing. DAS sites in particular have sometimes resulted in new tall poles appearing in front of a person's house without any notice.

Local government cannot be so restricted that it has limitations on which officials may review an application. Administrative practices vary among communities, which have different rules and different character areas. Covered requests should not be exempt from local building codes and land use ordinances. Setbacks should be respected.

An application should absolutely be allowed.

## IV.2.89 (131). (Expedited Procedures/Limited Documentation

Every request, particularly in an urban setting, should be review case-by-case. In an urban setting, demands on the same space create difficulties in locating facilities. Section 6409(a) should not be interpreted to allow the Commission to limit fees, local processes or the time for review. Again, if the Commission's intent is not to be a national zoning board, then it should allow local jurisdictions the ability to best deal with balancing the community's needs with the needs of industry. The City should be allowed to determine when an expedited process is appropriate and what documentation is needed to make sure the installation and placement of wireless facilities is safe and in the best interests of the community with respect to location of all the equipment that is going to impact the property where it will be placed.

## IV.2.90 (132) (Limits on procedures, Limits on who can review)

Again, the City should be allowed to formulate reasonable procedures to address the needs of its particular community. The Commission should not impose limits on who can review the applications.

## IV.2.91 (133) (Information required for a collocation)

The Commission has asked if there is a need for the FCC to establish federal standards governing the information that applicants may be required to provide. The City's answer to this is "No" because the City is in the best position to determine what information is needed to process an application.

The Commission has also asked if it should clarify that a local government may not require information of documents that are not relevant to the criteria for approval. The City's answer to this question is "No" because it assumes that a local government asks for irrelevant information, which is not the case. The *TCG New York, Inc. v. City of White Plains* case that was cited is not an appropriate proof of local governments being bad actors. In a jurisdiction like Arizona where certain services are exempt from fees, it is absolutely relevant to ask a telecom provider what types of services it provides.

#### *IV.*2.92 (134) (Time Limits)

The shot clock time limits of 90/150 days are short enough. The FCC should not impose a shorter time-frame for review. There should not be a presumption that local governments intentionally delay processing of applications. If the application can be approved in less than the 90/150 days, then it will be. Any time period, however, must be tolled when the applicant submits an incomplete application for a covered request. To determine otherwise would create a disincentive for an applicant to provide all the required information.

There should be no limits on the ability of a municipality to require such additional information or documentation, and the City should be able to extend the time period by agreement with the applicant.

### IV.2.9393 (135) (Moratoria)

If there is a moratorium in place, there should be time added to the process, however, although the City has not to date imposed any moratoria on the placement of wireless facilities, a local government should have the right to do so. A moratorium with a reasonable time period allows a local government to put ordinances in place.

## IV.2.94 (136) (Type of Review)

The Commission asks if requests for removal should be eligible for a more expedited process of review than new collocations. The City's answer is that they definitely could be under the appropriate circumstances and the City does have an expedited process for these.

The Commission also asked if replacements applications should be subject to a more expedited process. The City's answer is "No" because it depends on the circumstances.

#### *IV.2.95 (137) (Remedies)*

The Commission asked if a local government's failure to act should result in a "deemed granted" remedy by law after a certain amount of time. The City's answer is "No" because it would be more appropriate for the courts to craft case-specific remedies.

As discussed throughout this document, the City needs to have the ability to deny a Covered Request if it would violate a public safety code designed to protect life and property.

#### IV.98 (140) (Effect of a Denial)

The City objects to a denial being subject to a "deemed granted" remedy, especially since the denial could be s because the request is not a "Covered Request".

## V. Implementation of Section 332(C)(7)

# V.103 (153). (Definition of Collocation)

When defining "substantial increase", the definition should take into consideration not only the collocation site of the antenna, but also any ground equipment as well.

The definition of structure is important. In the case of Hayden Butte, would a mountain be considered a "structure"? If so, the mountain would never change in size, but the size of the proposed collocation of an antenna or transmission equipment could.

# V.104 (154). (Completeness of Applications)

The City does not believe it is appropriate for the Commission to quantify when a siting application is considered complete. Every state and local jurisdiction has an individual application process. We would be amenable to a rule that the siting application must include all information requested as the definition of "complete."

An application should be deemed complete when all the questions have been completely answered and all the information and documentation requested has been supplied. This may require the City to have an extensive application, but the time period should not begin to run until all the information is received. The City has experienced often difficulty in getting providers to provide information and to do so in a timely manner.

#### V.108-109(158-159) Shot Clock Application to DAS

These installations include a large number of sites, with many of them in the ROW requires a greater processing time than the 90/150 shot clock rules. FCC says the applicant and the City can agree to extensions of time in appropriate cases.

The Shot clock should not apply to DAS installations where the wireless antenna portion will be going on a support structure that does not currently house a wireless facility. Since DAS always involves the installation of ground or pole-attached equipment as well as underground fiber cable, these systems need to be subject to review by the local government.

DAS and small cells are so new that local jurisdictions need time to work with the providers to

develop the appropriate locations (particularly with respect to placement in the ROW) and the use of

locally-owned poles presents many issues that need to be addressed by a pole use or ROW use agreement.

**CONCLUSION** 

The City of Tempe, Arizona urges the Commission to conclude that right-of-way and facility

management and charges are not impeding broadband deployment and adopt narrow definitions of

"associated equipment", "transmission equipment", "tower" and "base station". As indicated above, in

the City of Tempe, our policies and procedures are designed to protect important local interests, and have

done so for many years. There is no evidence that the policies have impaired any company from

providing broadband service here. For the reasons given above, the City urges the Commission to limit

the scope of Section 6409(a) rather than expand it to take away all local control that the City needs to

protect the interest of its citizens and community.

Respectfully submitted,

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